OPINION OF COURT OF APPEALS.

(Filed Dec. 17, 1965, Carl W. Reuss, Clerk.)

No. 16071.

United States Court of Appeals for the Sixth Circuit.

Hamilton National Bank of Knoxville, Executor of the Estate of John Edd Bradley,
Plaintiff-Appellee,
v.
United States of America,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee.

Decided December 17, 1965.

Before: Celebrezze, Circuit Judge, Connell* and Machrowicz**, District Judges.

Celebrezze, Circuit Judge. On March 19, 1961, John Bradley died testate, survived by his wife, Dora Bradley, and two minor children by a former marriage. On April 11, Dora Bradley filed her dissent from the will of her deceased husband. In conformity with T. C. A., Section 30-802, the widow then filed an application for a year's support. The amount of $8,400. was set apart as the widow's year's support. The executor of the estate of John Bradley filed a federal estate tax return. Included in the amount of the marital deduction from the gross estate of the decedent was the $8,400. year's support.

* Honorable James C. Connell, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

** Honorable Thaddeus M. Machrowicz, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

This deduction was disallowed and deficiency of $1,548.78 was paid. In this suit to recover the assessment, the District Court, in its opinion reported in 229 F. Supp. 885 (1964), held the executor of the estate of John Bradley was entitled to a refund of federal estate taxes in the amount of $1,548.78. The United States appeals.

We are here concerned with the applicability of the marital deduction to the widow's year's support. The availability of the year's support to the surviving spouse under state law is not in doubt.

The sole question presented by this appeal is whether, under Tennessee law, a widow's interest in a statutory year's support constitutes a "terminable interest" within the purview of Section 2056 (a), (b) (1) of the 1954 Internal Revenue Code, and consequently fails to qualify for the marital deduction.

Section 2056 (a), (b) (1), 1954 Internal Revenue Code provides:

> "(a) Allowance of marital deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.
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> "(b) Limitation in the case of life estate or other terminable interest.
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> "(1) General Rule. Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will termi-

nate or fail, no deduction shall be allowed under this section with respect to such interest * * *."

Congress has indicated that, other than the enumerated exceptions to the terminable interest rule, Section 2056 (a), (b) (1) was intended to be "all encompassing with respect to various kinds of contingencies and conditions". Sen. Rept. No. 1013 (Part 2) 80th Congress, 2d Sess., pg. 7.

The Supreme Court in **Jackson v. United States,** 376 U. S. 503 (1964), held that in order for the widow's allowance to qualify for the marital deduction, and thus escape the terminable interest limitation, the widow's interest in the year's support must be indefeasible and unconditional as of the moment of the decedent's death. The critical factor in applying the terminable interest rule is the possibility under state law of the failure of an interest rather than the actual failure. In most states, the widow's year's support is subject to a number of contingencies at the time of the husband's death, each of which may render the interest terminable.[1]

If under state law the right to receive the allowance terminates upon the occurrence of such contingencies as

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[1] There still remains an uncertainty as to how broadly the terminable interest provision will be defined. It has been suggested that the adoption of the date of death approach will eliminate almost all deductions for widow's allowances. **Landers v. Commissioner of Internal Revenue,** 38 T. C. 828 (1962); **Mertens, The Law of Federal Gift and Estate Taxation,** 1964 Cumulative Supplement, Section 29.27; 22 New York University Institute on Federal Taxation 1146 (1964); 63 Michigan Law Review 924 (1964-1965).

In **Jackson v. United States,** *supra,* the Court said:

> "We are mindful that the general goal of the marital deduction provisions was to achieve uniformity of federal estate tax impact between those States with community property laws and those without them. But the device of the marital deduction which Congress chose to achieve uniformity was knowingly hedged with limitations, including the terminable-interest rule. These provisions may be imperfect devices to achieve the desired end, but they are the means which Congress chose."

the death or remarriage of the widow, the widow's interest is terminable under Section 2056 (a), (b) (1). **Jackson v. United States,** *supra*; **Cunah's Estate v. Commissioner of Internal Revenue,** 279 F. 2d 292 (C. A. 9, 1960); **United States v. Quivey,** 292 F. 2d 252 (C. A. 8, 1961); **Darby v. Wiseman,** 323 F. 2d 792 (C. A. 10, 1963); **United States v. Edmondson,** 331 F. 2d 676 (C. A. 5, 1964); **The Second National Bank of New Haven v. United States,** 222 F. Supp. 446 (D. C., Conn. 1963).

Where the widow has an absolute right at the date of death to the year's support, and the right is not extinguished by death or remarriage, the following courts have held the widow's support is not a terminable interest. **Estate of Avery v. Commissioner of Internal Revenue,** 40 T. C. 392 (1963); **Rensenhouse v. Commissioner of Internal Revenue,** 31 T. C. 818 (1959); **Molner v. United States,** 175 F. Supp. 271 (D. C., Ill., 1959); and **Reynolds v. United States,** 189 F. Supp. 548 (D. C., Mich., 1960).

Many states, such as Tennessee, require the surviving spouse to dissent from the will and apply for the year's support before the widow is entitled to the year's support. The fact that a petition by the widow is a prerequisite to granting a widow's year's support has been held not to render the widow's interest terminable. **Rensenhouse v. Commissioner of Internal Revenue,** *supra*, and **Molner v. United States,** *supra*. In **Rensenhouse,** the Court said:

> "The invocation of the proper legal procedures is required with regard to widow's allowances in most jurisdictions, and if this were a relevant factor in considering the applicability of Section 812 (e) (1) (b) it would almost universally preclude the allowance as a marital deduction of amounts expended in accordance with the local law for support of the surviving spouse of the decedent."

Similar to the widow's dissent and application for the year's support is the widow's dissent and application for

compensation in lieu of dower. It has been uniformly held the compensation qualifies for the marital deduction, and invoking the necessary legal procedures to enforce the right is not a condition or contingency precedent to its existence. **United States v. Crosby**, 257 F. 2d 515 (C. A. 5, 1958); **Dougherty v. United States**, 292 F. 2d 331 (C. A. 6, 1961); **United States v. Hiles**, 318 F. 2d 561 (C. A. 5, 1963); **First National Bank of Roanoke v. United States**, 335 F. 2d 91 (C. A. 4, 1964); **Moore v. United States**, 63-2 U. S. T. C., Para. 12.156 (D. C., Ky., 1963); **Wachovia Bank and Trust Co. v. United States**, 234 F. Supp. 897 (D. C., N. C., 1964); Tax Regulations, Sec. 20.2056 (e)-2 (c).[2]

To hold that an interest is terminable only because legal procedures are invoked to enforce an interest which is otherwise vested at the date of the husband's death, is to hold that all elective rights, such as the widow's allowance and the statutory interest in lieu of dower, are disqualified as marital deductions.[3] However, this question need not be answered here for under Tennessee law, as we construe it, the widow does not have a vested right to the year's allowance at the date of her husband's death.

The applicable provisions of the Tennessee Code provide:

> "§ 30-802. Year's support set apart for widow and family. Upon the application of the widow of an intestate, or of a widow who dissents from her husband's

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[2] It is important to note that some state statutes provide that in the event the surviving spouse dies after the testator and before the time for dissent expires, the personal representative of the surviving spouse may make the dissent.

However, some states hold the right to dissent is personal to the surviving spouse and does not survive the death of the surviving spouse. Nevertheless, all the above cited cases hold the statutory interest in lieu of dower qualifies for the marital deduction.

[3] See footnote 1.

will, the county court shall appoint three (3) freeholders, unconnected with her either by consanguinity or affinity, who, being first duly sworn to act impartially, shall set apart so much of the crop, stock, provisions, moneys on hand or due, or other assets, as may be necessary for the support of such widow and her family until the expiration of one (1) year after the decease of her husband."

"§ 30-803. Year's support exempt from debts or execution. The moneys and effects so set apart shall be the absolute property of the widow for said uses, and shall not be taken into the account of the administration of the estate of said intestate, nor seized upon any precept or execution."

"§ 30-805. Year's support given children when no widow surviving. If there be no widow, or she die before the year's support is set apart, the same provision shall be made for the children of the intestate, or of the widow, or of both, under the age of fifteen (15)."

Pursuant to Section 30-802, when a husband dies testate the widow must first dissent from her husband's will before she applies for the widow's support. Section 30-803 gives absolutely to the widow the money and property set apart for her support. The support vests absolutely when the property is set apart. **Bayless v. Bayless**, 44 Tenn. 359 (1867); and **Webb v. Brandon**, 51 Tenn. 285 (1871).

Section 30-805 makes provision for the support of the children when the widow dies before the year's support is set apart. This section makes it clear that if the widow dies before the year's support is set apart, the widow's estate does not have a right to the year's support. Rather, upon the contingency of the widow's death prior to a setting apart of the year's support, a right of support under

certain circumstances inures to the benefit of the minor children.[4] Implicit in this section is the fact the widow has a terminable interest in the year's support until it is set apart.[5]

Significantly, the comparative legislation for Section 30-802 refers to N. Car. Gen. Stat., Section 30-15 and Section 30-20. Prior to the 1961 amendments these two sections provided:

> "§ 30-15. Every widow of an intestate, or of a testator from whose will she has dissented, shall, unless she has forfeited her right thereto as provided by § 52-19 and § 52-20 be entitled, in addition to her distributive share in her husband's personal estate, to an allowance therefrom of the value of $500 for her support for one year after the decease. Such an allowance shall be exempt from any lien by judgment or execution, acquired against the property of the husband."

> "§ 30-20. Upon the application of the widow . . . the personal representative of the deceased shall apply to Justice of the Peace . . . to summon two persons . . . who . . . shall . . . ascertain the person or persons entitled to an allowance . . . and assign to the widow . . . so much thereof as they shall be entitled to by law . . . such assignment shall vest in

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[4] Here it is not argued that the minor children would take under this section, since they are the minor children of a previous marriage and not dependent upon the surviving spouse for their support. **Chapman v. Tipton,** 200 Tenn. 237 (1956).

[5] In **Pope v. Alexander,** 194 Tenn. 146 (1952), the husband died testate on May 8, 1948. Twelve days later the surviving spouse died. One of the questions raised in the case was whether or not the estate of the widow was entitled to a widow's year's support. The Tennessee Supreme Court affirmed the Chancellor by saying that "for obvious reasons" the widow's estate was not entitled to the year's support. The Court, however, did not give the reasons for its holding.

the widow and children such property and the right to collect the debts thus alloted."

The above North Carolina statutes providing for the year's allowance closely resemble the Tennessee support statutes. The North Carolina courts have held that if a widow died before the allotment was confirmed, the right to the widow's allowance did not survive her death. **Cox v. Brown,** 27 N. C. 194 (1844); **In re Mary Dunn,** 63 N. C. 137 (1869); **Simpson v. Currton,** 97 N. C. 116 (1887).

In **Wachovia Bank and Trust Co. v. United States,** *supra,* the widow applied for and was awarded a year's allowance. Holding the widow's allowance did not qualify for the marital deduction since the allowance abated if the surviving widow died before the allowance had been assigned to her, the Court said:

"Under North Carolina General Statutes, Chapter 30, § 16, the administrator is only under a duty to assign the year's allowance upon written application of the widow, signed by her, and within one year from the decedent's death. If these requirements are not met, there is no duty to assign the allowance; therefore, it is terminable. Following the Jackson opinion, the Court holds that the widow's year's allowance herein is not part of the marital deduction."

T. C. A., Section 31-611 is not applicable here, as appellee contends. This section provides:

"§ 31-611. Death of surviving spouse before expiration of time for dissent. Powers of personal representative. In event either the widow or husband die after the death of the spouse-testator and before the time for dissent expires, the personal representative of the widow or husband may, in like manner and every respect, seek the guidance of the court respecting a dissent, with like authority to the court."

Section 31-611 is found in the dower and dissent chapter of the Tennessee Code and does not give the personal representative the right to apply for the widow's allowance. This Section gives the personal representative the right to seek the guidance of the court respecting a dissent, it does not give the personal representative the absolute right to dissent.[6]

This Court finds that under Tennessee law, the widow loses her year's support if she dies prior to the application and setting apart of the allowance, and that under Section 30-803 her rights vest as of the time the property is set apart, and not at the moment of decedent's death. Under **Jackson v. United States**, *supra*, this is a terminable interest and consequently does not qualify for the marital deduction.

The judgment of the District Court will be reversed and the case remanded with instructions to enter judgment for the Appellant.

6 Tennessee Code Annotated (Official Edition) (1956 and Cum. Supp.):

TITLE 30.

ADMINISTRATION OF ESTATES.

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CHAPTER 8.

ALLOWANCES TO FAMILY.

30-801. **Widow's right to use of certain property until letters granted.**—Where a man shall die intestate, leaving widow, until letters of administration are

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[6] In **Hamilton National Bank v. Haynes**, 180 Tenn. 247 (1943), the Court denied the application to dissent, saying: "The Court is not at all interested in authorizing a dissent from the will for purposes of enriching the estate of such deceased person for the benefit of his or her heirs." See also **Pinkerton v. Truman**, 196 Tenn. 448 (1953).

granted, she may: (1) Take into her possession and care all the personal estate of her deceased husband, and the crop then growing; (2) make use of such part of said crop, and of the provisions on hand, as may be necessary for the support of herself and family; (3) and also use the stock and plantation utensils for the purpose of completing, securing, and selling such crop.

30-802. **Year's support set apart for widow and family.**—Upon the application of the widow of an intestate, or of a widow who dissents from her husband's will, the county court shall appoint three (3) freeholders, unconnected with her either by consanguinity or affinity, who, being first duly sworn to act impartially, shall set apart so much of the crop, stock, provisions, moneys on hand or due, or other assets, as may be necessary for the support of such widow and her family until the expiration of one (1) year after the decease of her husband.

30-803. **Year's support exempt from debts or execution.**—The moneys and effects so set apart shall be the absolute property of the widow for said uses, and shall not be taken into the account of the administration of the estate of said intestate nor seized upon any precept or execution.

30-805. **Year's support given children when no widow surviving.**—If there be no widow, or she die before the year's support is set apart, the same provision shall be made for the children of the intestate, or of the widow, or of both, under the age of eighteen (18).

30-807. **Property exempt from execution.—Exemption vesting in widow for herself and in trust for children.**—The property exempt by law from execution shall, on the death of the husband, be exempt from execution in the hands of, and be vested in, the widow,

without regard to the size or solvency of the estate of the deceased, for herself and in trust for the benefit of the children of the deceased, or of the widow, or of both, and shall not go to the executor or administrator, and, in case there be no widow, and the estate be either solvent or insolvent, such property shall be exempt for the benefit of the minor children under eighteen (18).

Tennessee Code Annotated:

30-906. **Application for dower or share—Courts having jurisdiction—County surveyor and appointees to make allotment.**—The surviving spouse may make application to any one of said Courts in the county where the husband or wife, as the case may be, last resided before death, for the appointment of two (2) freeholders or householders of the county, unconnected by affinity or consanguinity with those interested in the estate of the deceased, to allot and set apart, in connection with the county surveyor, or his deputy, to the applicant, dower, or shares, or both, according to law.

30-912. **Homestead set apart before dower out of same lands—Assignment out of proceeds from sale of realty.**—Where a widow is entitled to both homestead and dower out of the same lands, the commissioners shall set apart the homestead first, and then one-third (⅓) of the remainder of such lands as dower, and if the real estate is so situated that the homestead and dower cannot be set apart in kind, as herein provided, then such realty shall be sold, and one thousand dollars ($1,000.00) of the proceeds thereof invested in real estate for the benefit of said widow and minor children, under the direction of the Court having jurisdiction, to be held as homestead subject to the law governing homesteads, and dower shall be assigned out of the residue of said proceeds.

30-916. **Partition suits—Dower to be assigned before decree.**—Whenever heirs or devisees petition for a partition of lands in which the widow is entitled to dower, the dower shall be allotted, upon motion or petition, before the partition is decreed.

30-1614. **Estates which may be divested.**—Where an estate or interest may be divested by the act or omission of the transferee, it shall be taxed as if there were no possibility of divesting.

TITLE 31—DESCENT AND DISTRIBUTION.

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31-605. **Wife dissenting from will and endowment.**—A widow may dissent from her husband's will:

(1) Where a satisfactory provision in real or personal estate is not made for her, in which case she shall, in writing, signify her dissent in open court, to be entered of record, within nine (9) months after the probate of the will.

(2) Where a provision in personal estate is made for her, but the whole of the husband's property, including the bequest, is taken for the payment of his debts, in which case, without any formal dissent, she may sue for her dower.

And in either case, she shall be endowed and provided for as if her husband dies intestate, and shall be entitled to her distributive share as provided in Sec. 31-606.

31-606. **Distributive share and dower of widow dissenting from husband's will.**—When a husband shall die, leaving a will from which the widow dissents, within the time and in the manner provided by law, and leaving no child, or not more than two (2), his widow shall be entitled to one-third (⅓) part of the personal estate, in addition to her dower in the real

estate. But if the husband leaves more than two (2) children, the widow shall share equally with all the children, she being entitled to a child's part.

31-611. **Death of surviving spouse before expiration of time for dissent—Powers of personal representative.** —In event either the widow or husband die after the death of the spouse-testator and before the time for dissent expires, the personal representative of the widow or husband may, in like manner and every respect, seek the guidance of the Court respecting a dissent, with like authority to the Court.

Internal Revenue Code of 1954:

Sec. 2056. Bequests, etc., to Surviving Spouse.

(a) **Allowance of Marital Deduction.**—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse,

* * *

(b) **Limitation in the Case of Life Estate or Other Terminable Interest.**—

(1) **General rule.**—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

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(e) **Definition.**—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or courtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

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(26 U. S. C., 1958 ed., Sec. 2056.)

Treasury Regulations on Estate Tax (1954 Code):

Sec. 20.2056 (a)-1. **Marital deduction; in general.**

(a) A deduction is allowed under section 2056 from the gross estate of a decedent who was a citizen or resident of the United States at the time of his death for the value of any property interest which passed from the decedent to his surviving spouse, if the interest is a "deductible interest" as defined in Section 20.2056 (a)-2, * * *. * * *

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(26 C. F. R., Sec. 20.2056 (a)-1.)

Sec. 20.2056 (a)-2. **Marital deduction; "deductible interests" and "nondeductible interests."**

(a) Property interests which passed from a decedent to his surviving spouse fall within two general

categories: (1) Those with respect to which the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. These categories are referred to in this section and other sections of the regulations under section 2056 as "deductible interests" and "nondeductible interests," respectively (see paragraph (b) of this section). * * *

(b) An interest passing to a decedent's surviving spouse is a "deductible interest" if it does not fall within one of the following categories of "nondeductible interests":

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(4) A property interest passing to a decedent's surviving spouse which is a "terminable interest," as defined in Section 20.2056 (b)-1, is a "nondeductible interest" to the extent specified in that section.

(26 C. F. R., Sec. 20.2056 (a)-2.)

Sec. 20.2056 (b)-1. **Marital deduction; limitation in case of life estate or other "terminable interest."**

(a) **In general.** Section 2056 (b) provides that no marital deduction is allowed with respect to certain property interests, referred to generally as "terminable interests," passing from a decedent to his surviving spouse. The phrase "terminable interest" is defined in paragraph (b) of this section. However, the fact that an interest in property passing to a decedent's surviving spouse is a "terminable interest" makes it nondeductible only (1) under the circumstances described in paragraph (c) of this section, * * *.

(b) "**Terminable interests.**" A "**terminable interest**" in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates * * * are therefore terminable interests. * * *

(c) **Nondeductible terminable interests.** (1) A property interest which constitutes a terminable interest, as defined in paragraph (b) of this section, is nondeductible if—

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or moneys worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the termination or failure of the spouse's interest.

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(g) **Examples.** The application of this section may be illustrated by the following examples, in each of which it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse did not pass for an adequate and full consideration in money or money's worth:

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Example (8). Assume that pursuant to local law an allowance for support is payable to the decedent's surviving spouse during the period of the administration of the decedent's estate, but that upon her death or remarriage during such period her right to any further allowance will terminate. Assume further that the surviving spouse is sole beneficiary of the decedent's estate. Under such circumstances, the allowance constitutes a deductible interest since any part of the allowance not receivable by the surviving spouse during her lifetime will pass to her estate under the terms of the decedent's will. If, in this example, the decedent bequeathed only one-third of his residuary estate to his surviving spouse, then

two-thirds of the allowance for support would constitute a nondeductible terminable interest.

(26 C. F. R., Sec. 20.2056 (b)-1).

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Sec. 20.2056 (e)-2 **Marital deduction; definition of "passed from the decedent to his surviving spouse."**

(a) In general. In general, the definition stated in Section 20.2056 (e)-1 is applicable in determining the property interests which "passed from the decedent to his surviving spouse." Special rules are provided, however, for the following:

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An allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. In determining whether or not such an interest is deductible, however, see generally the terminable interest rules of section 20.2056 (b)-1 and especially example (8) of paragraph (g) of that section.

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(26 C. F. R., Sec. 20.2056 (e)-2).

Sec. 20.2056 (e)-3 **Marital deduction; definition of "passed from the decedent to a person other than his surviving spouse."**

The expression "passed from the decedent to a person other than his surviving spouse" refers to any property interest which, under the definition stated in Section 20.2056 (e)-1 is considered as having "passed from the decedent" and which under the rules referred to in Section 20.2056 (e)-2 is not considered as having "passed from the decedent to his

surviving spouse." * * * Whether or not there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.
(26 C. F. R., Sec. 20.2056 (e)-3.)